A

PP

v.

AF (A CHILD) & ORS

B

HIGH COURT MALAYA, SHAH ALAM
MOHD YAZID MUSTAFA J
[CRIMINAL TRIAL NO: 45B-87,116-2007 & 45B-55-2008]
17 AUGUST 2010

C ***CRIMINAL LAW:*** *Penal Code - Murder - Section 300 - Incident occurring in crowded and chaotic circumstances - Whether evidence of eye-witness credible - Whether actus reus proved by eye-witness's account*

EVIDENCE: *Witnesses - Interested witness - Strict assessment of testimony - Whether evidence independent - Whether corroboration required*

D

EVIDENCE: *Identification parade - Identification made of known person - Whether identification or recognition - Whether identification parade useful in such circumstances*

E The four accused children herein were jointly charged with murder under s. 302 of the Penal Code, for causing the death of one Chong Gui Rong during an illegal assembly on 29 September 2006. According to the post mortem report, the injuries sustained by the deceased on the head were fatal in nature and the deceased's F cause of death was blunt injuries to the head.

The prosecution's case was that there was a fight which involved two groups, *ie,* Malay and Chinese, wherein both were made up of students. The cause of the fight was related to some fireworks. The prosecution's witnesses included SP8, SP9, SP10, SP14 and G SP15. SP8, SP9 and SP10 were friends of the deceased, whereas, SP14 and SP15 were persons who worked in the area.

In his testimony, SP8 said that he could not clearly identify the person who had hit the deceased although he claimed that he did H see one person in the group holding what looked like a piece of wood or iron rod whilst hitting the deceased with it. Although SP8 claimed that it was the first child accused who attacked the deceased, he later admitted that he could not positively identify the person who had punched the deceased in the face since it I happened at the spur of the moment.

SP9 who gave evidence, claimed that they were chased by a group of Malay boys but admitted that the situation was chaotic. SP9 identified the first child accused in three identification parades as the person who had punched the deceased's nose and face but claimed that he could not be certain whether they were other Malays apart from the first child accused.

SP10 who also gave evidence regarding the events that had transpired on that fateful night, agreed that a lot of what had happened was forgotten by him because the incident had happened a long time ago.

Held (acquitting and discharging the accused persons):

(1) The eye-witnesses for the prosecution failed to prove on a *prima facie* basis that any of the four accused were involved in the fight or were part of the group of unidentified Malay youths who had attacked and caused the deceased's death on 29 September 2006. Furthermore the incident occurred in a crowded area within the vicinity of a Ramadhan bazaar. The incident involving the fight was extremely chaotic. (para 20)

(2) Both SP8 and SP9 could not positively identify the person or persons who had caused the fatal blow to the deceased. The last time that SP8 had seen the deceased, the latter was still upright and able to run away from the angry mob of Malay youths into a motorcycle repair shop. SP8, therefore, was unable to testify as to the actual person or persons who had attacked the deceased. Furthermore SP8's testimony has to be assessed strictly in light of the fact that he is an interested witness. (paras 21 & 23)

(3) SP9 testified and confirmed in cross-examination that the situation was extremely chaotic and he could not identify who had attacked him and the deceased or even whether any of the persons had used a weapon during the fight. SP9 had also left the deceased and escaped to hide in the restaurant with SP8 until the arrival of the police. As such, SP9 was also unable to identify the actual person or persons who had attacked the deceased. (para 23)

(4) SP10 was able to identify the first and second accused persons in his identification parade because SP10 was working in an advertising shop in the area where the said accused

persons were staying. The court is mindful to reject the testimony of SP10 because he was standing at a far distance from the scene where the deceased was being attacked. SP10 further admitted that he had forgotten many of the events on the fateful day and the last he had seen the deceased was when the latter was running towards the surau. SP10 had gone into a coffee shop thereafter and did not see what had happened further to the deceased. These facts taken with the fact that SP10 was the deceased's friend and an interested witness, make his evidence unreliable. (para 24)

(5) SP15's identification of the four accused children is attributed to the admitted fact that the four children had regularly been customers in his motorcycle repair shop. SP15's testimony has to be treated with caution because he had testified that the deceased was chased by a group of ten youths but that SP15 could only identify the four children who were his regular customers. (para 26)

(6) The prosecution had, therefore, failed to prove *prima facie* the first element under s. 300 of the Penal Code *viz* the *actus reus* to cause injury on the deceased that culminated in the latter's death against the four accused children. This is because none of the witnesses could positively identify the persons who had attacked the deceased. Therefore the prosecution has also failed to *prima facie* establish the second element of *mens rea* to cause murder against the four accused children. (para 29)

Case(s) referred to:
Haryana v. Ram Singhhand and Another Appeal [2002] 1 LRI 324 ***(foll)***
Muniandy & Ors v. PP [1966] 1 LNS 110 FC ***(refd)***
Robin anak Mawang v. PP [2005] SGHC 222 ***(dist)***

Legislation referred to:
Penal Code, ss. 149, 300, 302

For the prosecution - Yong Leou Shin; DPP
For the 1st child - Ariff Azami; M/s Azizul Adzly & Ariff
For the 2nd child - Jagdish Kaur; M/s AS Jag & Co
For the 3rd child - James George; M/s James George & Co
For the 4th child - Salim Bashir; M/s Salim Bashir Ruswira & Co

Reported by EM Goh

JUDGMENT

Mohd Yazid Mustafa J:

[1] On 9 June 2010, at the end of the prosecution's case, I had acquitted and discharged all four children from the charge under s. 149 of the Penal Code that is punishable under s. 302 of the Penal Code. The amended charge against the four children is as follows:

> Bahawa kamu bersama-sama beberapa orang yang masih bebas, pada 29 September 2006 jam lebih kurang 6.30 petang di tepi jalan, Taman Rakan, Bandar Baru Sungai Long, Kajang, di dalam daerah Hulu Langat, di dalam negeri Selangor Darul Ehsan, sebagai ahli suatu perhimpunan yang menyalahi undang-undang, pada menjalankan tujuan bersama perhimpunan iaitu membunuh Chong Gui Rong (KPT: 900819-14-5659) dan semasa kamu semua adalah ahli perhimpunan tersebut, satu atau lebih daripada kamu telah membunuh Chong Gui Rong (KPT: 900819-14-5659), sebagaimana diketahui oleh kamu semua mungkin dilakukan pada melaksanakan tujuan bersama perhimpunan itu dilakukan dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 149 Kanun Keseksaan dan boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The trial of the case against the four children started on 10 February 2009 before the former presiding judge. On 1 February 2010, the case was transferred to be heard before this court after the elevation of the former presiding judge to the Court of Appeal. Henceforth, I proceeded to conduct the continued hearing of the case with the prosecution's witness SP11.

Facts As Established Through The Prosecution's Evidence

[3] The prosecution has called 25 witnesses to testify. The facts as established through the prosecution's witnesses are as follows.

Cause Of Death Of The Victim From The Testimony Of The Forensic Pathologist

[4] Dr Aung Thu Ya @ Mohamed Swarhib, SP3 testified that the external examination of the victim showed that the victim had sustained several abrasions and bruises on his face and head region, hands, arms and elbows and the chest region. The post mortem report (exh. P7) states that the injuries that the victim had sustained on the head were fatal in nature and the victim's cause of death was blunt injuries to the head. SP3 testified that the

A blunt injuries inflicted on the victim's head caused internal bleeding in the skull. SP3 explained that the injuries to the head could be caused by any blunt object such as helmets and wooden sticks. The skull bone however did not sustain any fracture. SP3 continued by stating that although the skull bone was not
B fractured, the injuries caused by a blunt object could result in brain movement and rupturing of the blood vessel. The injuries sustained by the victim were sufficient in the ordinary course of nature to result in death.

C **[5]** During cross examination, SP3 testified that it is not conclusive whether the three pieces of wood marked as exhs. P16(A), P17(A) and P18(A) were the weapons used in the present case. However, SP3 disagreed with the suggestion of the defence counsel that the murder weapon was other than a piece
D of wood. SP3 also disagreed with the suggestion of the defence counsel that the haemorrhage in the victim's skull had occurred one or two days prior to the day the post mortem was conducted on 30 September 2006 because the injury was recent. SP3 explained that such is the conclusion because the bruises on the
E victim were still red on 30 September 2006. If the bleeding was the result of an older injury, the bruises on the victim would not be that red. The red coloration of the bruises was consistent with an injury inflicted between 12 to 24 hours prior to the victim's death. SP3 could not comment as to whether urgent medical
F attention could have saved the victim from death or that the injury sustained by the victim could have been inflicted prior to 6.30pm on 29 September 2006. In re-examination, SP3 testified that there were no wood particles discovered on the victim's head that could be visible to the naked eye. SP3 explained that the
G victim's injuries could be caused by any blunt object such as the wood plank found at the scene of the crime. The victim's injuries were also not resulted from a fall.

The Testimony Of The Victim's Friends ie, SP8, SP9 And SP10

H **[6]** Phang Wai Kiat, SP8 testified that one day prior on 28 September 2006, there was a fight involving two gangs *viz* a Malay gang and a Chinese gang whereby both gangs were made up of students. The cause of the fight was regarding some fireworks. On the day of the murder on 29 September 2006, SP8
I was walking to a stall area at Taman Rakan, Sungai Long with his friend, Loo Wai Num (SP9) at about 4.45 in the evening. As they were approaching the stall area, they were suddenly surrounded by

a group of about nine or ten Malay youths. One of the boys had accused SP8 to have been involved in the fight on the previous day. Before SP8 could negate the accusation, he was punched on the face by the 1st child. Then SP8 was almost run from behind over by another Malay man riding on a motorcycle. SP8 managed to avoid being run over by the motorcycle. It was then that his friend by the name of Zakaria appeared on scene. SP8 asked Zakaria for assistance and the latter spoke to the Malay group. Thereafter, Zakaria told SP8 and SP9 to leave the area. SP8 and his friend entered a restaurant wherein SP8 then made a telephone call to the victim to come over and pick up SP8. The victim thereafter arrived at the restaurant and asked SP8 about the prior incident. The victim had then left the restaurant with SP9 on his motorbike to look for the earlier Malay group to explain the non-involvement of SP8, SP9 and the victim in the fight on 28 September 2006. SP8 attempted to stop the victim but it was in vain. SP8 then contacted the victim on his cell phone but the latter informed that he was surrounded by a group of Malay youths. SP8 had made another call to another friend by the name of Andy who informed the former to go over to a house in front of the restaurant. SP8 did so and it was then that he saw the victim and SP9 being attacked by a group of Malays nearby a market area. SP8 had run over to help his friends. Before reaching his friends, he had seen the victim fall to the ground, get up again and run away to escape the group of Malays. SP8 had turned back to wait at the restaurant. SP9 came over to the restaurant and told SP8 that the victim had escaped inside a motorcycle repair shop beside the market. SP8 and SP9 did not attempt to find the victim. SP8 testified that he could not clearly see the persons in the Malay group and neither could he identify the Malay person that had hit the victim. SP8 did see one person in the group holding what looked like a piece of wood or iron rod whilst hitting the victim with it. SP8 had seen the victim run towards the motorcycle repair shop but did not see what had happened to the victim once the later was inside the shop. The distance between the motorcycle repair shop and the restaurant was about 12 shops away. SP8 and SP9 had waited for the arrival of the police. Once the police had arrived at the scene of crime, SP8 walked over to where the victim was lying on the ground at the roadside. SP8 testified that there was a group of Malay men at the scene of crime and one of the persons had tried to hit him with either a wooden or iron stick. SP8 testified that the person that had tried to assault him was the 2nd child.

[7] In cross examination, SP8 agreed that he could not positively identify the person that had punched him in the face on 29 September 2006 because that particular incident occurred on the spur of the moment. This is inconsistent with his testimony in examination in chief wherein he had identified the 1st child as his attacker. SP8 did not go back home because his house was far from the restaurant. SP8 agreed that the group of Malay youths did not follow him into the restaurant after he was punched. SP8 agreed that it was another 15 minutes before the victim arrived at the restaurant after being called by the SP8 on the former's cell phone. SP8 explained that he had asked SP9 to follow the victim because he believed that the victim had intended to look for the Malay group that had attacked SP8. SP8 had called the victim to come to the restaurant in order to send the latter back home, SP8 had waited for five minutes before the victim arrived at the restaurant. Within the five minutes, nothing had transpired and nobody had looked for SP8. The victim was running from the T-junction and not from inside the market when he had fallen to the ground. The motorcycle repair shop that the victim had escaped into was still opened but SP8 did not see whether there was anybody inside. SP8 agreed that at the time, there were many people at the area because there was a Ramadhan bazaar seeing as the murder occurred during the Muslim month of Ramadhan. The scene of the murder was besides the market area nearby the T-junction. SP8 agreed that he had seen the person that had punched him earlier at the scene of murder. However, in re-examination, SP8 reversed his testimony by stating that he had not seen the person that had punched him at the scene of murder. SP8 had agreed with the suggestion during cross examination because of his own assumption seeing as the place was crowded with many people shopping for breaking fast at the Ramadhan bazaar.

[8] Loo Wai Num, SP9 testified that on 29 September 2006 at about 4.45pm he was walking with SP8 heading towards the barber shop and to have a meal at 'Meng Heng' restaurant in Taman Rakan. On the way to the restaurant they were accosted by one Malay boy. The Malay boy had punched SP8's nose. Then SP8 was nearly run over by an approaching motorcycle. Thereafter, SP9 and SP8 continued walking to the restaurant. However, before reaching the restaurant, SP9 and SP8 were chased by a group of Malay youths. The Malay boy that had

earlier punched SPS's nose was in the group that was chasing them. SP9 and SP8 ran towards the restaurant. SP9 and SP8 then had their meal at the restaurant. It was at the restaurant that SP8 made a phone call to the victim but SP9 did not overhear the telephone conversation. The victim arrived at the restaurant on his motorcycle. The victim joined SP9 and SP8 for a meal. SP8 told the victim about being assaulted by the Malay boy. The victim then decided to speak to the group of Malays. The victim asked SP9 to accompany him to look for the group of Malays. The victim and SP9 then proceeded to look for the group of Malays on the latter's motorcycle. Upon reaching a junction, the victim decided to make a u-turn back to the restaurant but they were stopped by a Malay person. The victim stopped his motorcycle and his motorcycle keys were taken by another Malay person. The victim was asked by the Malay person to leave his motorcycle and walked across the street to where a group of Malays were waiting. The victim and SP9 complied. The group of Malays was made up of young men in their twenties. Then a Malay man in his thirties asked the group of Malay youths whether the victim was involved in the fight on 28 September 2006. The answer was in the affirmative. The group of Malay youths then started to assault the victim and SP9 using their fists. SP9 saw one of the Malay youths hit the victim using an unidentified object. SP9 saw the victim being punched in the face and hit on the torso with an unidentified object and a helmet. The victim and SP9 were assaulted on the roadside besides a t-junction. SP9 managed to escape and ran away. The victim had also run towards a motorcycle repair shop. The group of Malay youths had chased after the victim and continued assaulting him in front of the motorcycle repair shop. SP9 testified that he had identified the 1st child in three identification parades as the person that had punched the victim's nose and face on 29 September 2006. SP9 did not identify the other two Malay youths that had assaulted the victim. However, later in his testimony SP9 stated that he could not be certain whether there were other Malays that had assaulted the victim apart from the 1st child.

[9] In cross examination, SP9 stated that he was not acquainted with the 1st child prior to the fight on 29 September 2006. SP8 had attempted to stop the victim from looking for the group of Malays that had attacked SP8. SP9 was certain that the victim merely wanted to take a ride on his motorcycle and not for the sole purpose of looking for the group of Malays. SP9 agreed that the situation was chaotic. At the time that the Malay man in his

thirties had asked the group of Malays about the victim's involvement in the fight on 28 September 2006, SP9 did not see whether any of the Malay youths were holding any weapons. SP9 agreed that after he escaped the angry mob, he did not know what had happened to the victim.

[10] Soh Chi Cherng, SP10 testified that he was working part time in an advertising shop in Taman Rakan on 29 September 2006. At about 5.45pm the victim and SP9 were riding on the former's motorcycle towards the advertising shop. SP10 had spoken to both the victim and SP9 before they both left. At about 6pm, SP10 made a phone call to the victim and was told by the latter that he was surrounded near a surau in Taman Rakan by a group of Malay youths and that his motorcycle keys were taken from him. SP10 then left his workplace and walked to the side of the said surau. On his way to the surau, SP10 had met up with SP8 who informed him as to what had transpired and both of them then proceeded to the surau. They then met up with SP9 who requested for assistance from SP10 and SP8 to help the victim. SP10 had seen the victim being surrounded and assaulted by a group of Malay youths made up of about 8-9 youths in the twenties. The victim had run towards SP10 and SP8. SP10 had seen the victim being hit with fists and one of the youths had attacked the victim with a piece of wood. SP10 cannot identify the victim's attackers. The victim had run towards a motorcycle repair shop. SP10 had thrown a piece of iron rod towards the angry youths. The mob then turned towards SP10 and started to hit him. At the time SP10 had thrown the iron rod towards the angry mob, he did not know what had happened to the victim. SP10 had ran away and the angry mob turned back towards the victim who had run towards the direction of the surau. SP10 had followed the angry mob and saw that the victim had changed his direction towards and entered the motorcycle repair shop. SP10 was about six shops away from the motorcycle repair shop. One of the Malay youths had pulled the victim out of the repair shop and hit him. SP10 had then gone into a coffee shop. SP10 did not see what had happened after he went into the coffee shop.

[11] SP10 had attended three identification parades. In the first identification parade, SP10 had identified the 1st child as the youth that had held a piece of wooden plank and assaulted the victim with said wooden plank and his fists. During the second identification parade, SP10 had identified the 2nd child as the

youth that had pulled the victim out of the motorcycle repair shop and assaulted the victim. In his cross examination, SP10 explained that the victim had fallen to the ground on the roadside after being assaulted by the angry mob of Malay youths. The situation was chaotic due to the chase of the victim by the angry mob and the act of assaulting the victim. SP10 was not certain as to the number of persons that had assaulted the victim. At the time, SP10 admitted that was afraid but he did not attempt to hide himself. SP10 disagreed with the defence counsel's suggestion that the 1st child was present at the scene of crime because he was selling drinks at his stall at the Ramadhan bazaar. SP10 agreed that at the time he had thrown the iron rod towards the angry mob and when the victim was pulled out of the repair shop, the victim was still able to run away. SP10 also agreed that the last that he had seen the victim was when the latter was running towards the surau. Thereafter, SP10 did not know what had happened to the victim because he was waiting inside a coffee shop. SP10 agreed that a lot of what had happened on the fateful day is forgotten by him because the incident had happened a long time ago. In re-examination, SP10 explained that his discussion with SP8 was only regarding the position of the surau and nothing else.

The Testimony Of The Public Witnesses SP14 And SP15

[12] SP14 (Mohd Azizan bin Rosli) testified that he was working as a sales assistant at a supermarket in Taman Rakan on 29 September 2006. At about 6.15pm he was told by a colleague about the fight in front of the motorcycle repair shop. SP14 went outside and saw the fight whereby the victim was being assaulted by a group of Malay youths. At the time, SP14 was standing in front of the supermarket and it as about 50 metres away from the fight. SP14 identified the 1st child and the 4th child as being part of the Malay youths who were attacking the victim. The 1st child and the 4th child were seen to be shoving and punching the victim. The 1st and 4th children could be identified because SP14 testified that they were his friends whom he had known since primary two. At about 6.45pm, SP14 was walking towards the Ramadhan bazaar towards his home for fast breaking. Upon reaching the Ramadhan bazaar, he had seen that the earlier fight had not ended. The victim's friends had come to the latter's assistance. The 1st and 4th children were still at the scene of the fighting and they were then fighting with the victim's friends. The

victim was on the left side of the road and he had vomited blood before lying prone on the roadside. The 1st and 4th children were assaulting the victim's friends with wooden planks. The victim's friends then ran towards his car. About 5-6 minutes thereafter the police arrived on the scene to disperse the fighting.

[13] In cross examination, SP14 explained that the fight which he had observed consisted of about 20 people but he only knew the 1st and 4th children and the victim. The situation was extremely chaotic and the fighting had involved fist fights between the victim and his assailants. SP14 agreed that he is unsure what the 1st child was doing during the fighting. SP14 agreed that he is also unsure as to what the 4th child was doing because the area was chaotic due to the fighting and filled with people shopping at the Ramadhan bazaar. There were other unknown persons who were attacking and fighting with the victim. When the victim was near the motorcycle repair shop, SP14 had noticed that the victim had sustained some light injury but SP14 did not notice whether there were any weapons used to attack the victim. The fighting was at two distinct places which were about 60 metres apart. The victim's friends were about five persons. SP14 admitted knowing that the 1st child was helping out his friend by the name of 'Hakimi' in selling drinks at a stall at the Ramadhan bazaar. SP14 admitted that when the police arrived at the scene of the crime, the 1st child was still within the area. SP14 knew that the 1st child was assaulted one day prior to the victim's death. On the day of the victim's death, SP14 had noticed that the 1st child still had a bandage on his forehead. SP14 agreed that the 4th child was also selling drinks at the Ramadhan bazaar. The distance between the scene of the fighting and the Ramadhan bazaar was about ten metres. SP14 agreed that when he reached the scene of the fighting, the victim was already lying prone on the roadside and there were several Malay youths still fighting with the victim's friends. In re-examination, SP14 reiterated that the 1st and 4th children were in a fist fight with the victim. The victim was also attacking the 1st and 4th children.

[14] SP15 (Yap Chin Meng) testified that on 29 September 2006, he was working in a motorcycle repair shop. Around 6pm thereafter, he witnessed the victim running into the repair shop while shouting for help. There was a group of about ten Malay youths running after the victim. Some of the youths entered the shop and dragged the victim outside. SP15 attempted to stop the youths from dragging the victim but was told to back off. SP15

went out of the shop and saw the youths attacking the victim using fists and feet. The victim did not fight back. SP15 identified the four children as being in the group that had attacked the victim. The 3rd child was identified as the youth who had dragged the victim out of the repair shop. The 2nd child was the youth who had told SP15 to back off and mind his own business. The victim was hit by all the children. After about five minutes, the victim managed to escape and the youths had chased after him. After SP15 had finished his work, he had gone over to where the victim was lying on the roadside. The four children were still in the area trying to run away. The victim had gotten up and taken 2-3 steps before falling back to the ground. SP15 saw the victim breathing heavily.

[15] SP15 had attended four identification parades after the incident. The 1st time was to record his statement. The 2nd to the 4th visits to the police station were for identification purposes. SP15 had identified all four children as the victim's assailants during the identification parade. In cross examination, SP15 agreed that he did not try to help the victim because the situation was not that serious. Only one youth had entered the repair shop. SP15 did not make any attempts to contact the police or asked for assistance from the people nearby his shop because he was still busy at work. SP15 reiterated that he had only seen the victim being attacked by the youths' fists and feet. SP15 did not observe anybody helping the victim. SP15 could recognize the 1st child because the latter had sent his motorcycle for repair works at the former's shop. SP15 agreed that there were several unknown assailants among the youths who had attacked the victim.

Police Witnesses SP17, SP18, SP21, SP24 - Identification Parade Of The Public Witnesses On The Four Children

[16] On 6 October 2006 at about 4.45pm, SP21 had conducted an identification parade for a suspect by the name of 'Reyono bin Samijo' and the 1st child. The line-up consisted of 15 persons who were similar to the 1st child in terms of age and physical attributes. The identification parade was attended by four witnesses who were SP9, SP10, SP15 and SP8. The four witnesses had identified the 1st child. The identification report is marked as exh. P38.

[17] On 15 April 2007 at about 12 in the afternoon, SP24 had conducted an identification parade on the 2nd child. There were ten persons in the identification line-up who were similar to the

2nd child in terms of race, height and physical attributes. All persons in the identification line-up were dressed in civilian clothing. SP9 was the first witness and he did not identify the 2nd child (identification report exh. P45). The second witness was Asri bin Sudahnan who did not identify the 2nd child (report marked as exh. P46). The third witness was SP8 who identified the 2nd child and told SP24 that he had seen the 2nd child holding a wooden plank and had run away when the police arrived at the scene of incident (report marked as exh. P47). SP24 had conducted another identification parade on 17 April 2007 for the 2nd child whereby five witnesses were called. The 2nd child was placed in the identification line-up consisting of ten persons similar to his race, shape, skin tone and height. The first witness was SP16 who had identified the 2nd child as the person who had attacked the victim. The second witness was Chui Jun Seng who stated that the person who had attacked the victim was not in the line-up. SP15 was the third witness who stated that the 2nd child had pulled the victim. Then Mohd Faiz bin Mustafa was called but he could not identify the 2nd child. The last witness was SP10 who stated that he had seen the 2nd child holding a wooden plank on 29 September 2006 (the identification report is marked as exh. P48).

[18] At about 12 in the afternoon on 13 February 2008, SP17 had conducted an identification parade for the 3rd and 4th children. The identification parade consisted of 15 youths close to the children's age, race and physical attributes. The identification parade was attended by four witnesses *viz* SP16, SP9, SP10 and SP8. The four witnesses were explained about the reason for their attendance at the police station and the procedure for the said identification exercise. The children were dressed in civilian clothing as with the other persons lined up in the identification parade. SP16 was the first witness brought before the identification line-up but SP16 did not identify the 3rd and 4th children. Next was SP9 who had identified the 4th child. SP10 was called up next and he did not identify any of the two children. Lastly was SP8 who similarly did not identify the two children as being the persons who had attacked the victim. In cross examination, SP17 clarified that SP9 had in fact identified the 3rd child during the identification parade. SP9 had told SP17 that the former had seen the 3rd child and his friends attacking the victim with their hands.

[19] Five days thereafter on 18 February 2008 SP18 had carried out another identification parade for the 3rd and 4th children. Similar to the earlier identification parade, there were 15 persons in the identification line-up who were chosen because of their similarity to the two children in age, race, height and physical attributes. The children were dressed in civilian clothing as with the others in the line-up. The children then were given a choice as to the position to be in the line-up. The first witness was SP15 who had identified both children. The second witness was Mohd Faiz bin Mustafa who had also identified the children. In cross examination, SP18 agreed that the identification report marked as exh. P32 contains a statement of SP15 that indicates that the latter had only seen the 3rd child at the scene of crime but did not see whether the 3rd child had also attacked the victim. SP18 agreed that the identification report marked as exh. P33 contains a statement from Mohd Faiz bin Mustafa that he had only seen the 3rd child chase after the victim with his friends and attacked the victim using their hands. SP18 confirmed that neither exh. P32 nor exh. P33 states that the 4th child had attacked the victim using a wooden plank.

Findings Of The High Court

Has The Prosecution Proven The Actus Reus Under Section 300 Of The Penal Code On The Four Children?

[20] In my judgment, the answer to this question is in the negative. I find that the prosecution's eye-witnesses have failed to *prima facie* prove that any of the four children were involved in the fight or were part of the group of unidentified Malay youths that had attacked and caused the victim's death on 29 September 2006. The circumstances leading up to the death of the victim was the existence of a fight involving a group of unidentified Malay youths and the victim with his friends. The incident occurred in a crowded area within the vicinity of a Ramadhan bazaar. The incident involving the fight was extremely chaotic. The victim had initiated to look for the unidentified group of Malay youths who had allegedly attacked SP8 and such action culminated in the fight that led to the latter's death.

[21] These facts are testified to by SP8 and SP9 who were the victim's friends. Both SP8 and SP9 could not positively identify the person or persons who had caused the fatal blow to the victim. The last time that SP8 had seen the victim, the latter was still upright and able to run away from the angry mob of Malay

youths into a motorcycle repair shop. Thereafter, SP8 had escaped to hide inside a restaurant. This court is according a strict assessment of SP8's testimony in light of the fact that he is an interested witness. In *State of Haryana v. Ram Singhhand and Another Appeal* [2002] 1 LRI 324, the Supreme Court of India held at para. 14 that:

> Admittedly all the supposed eye-witnesses are relations of the deceased. As such they fall within a category of interested witnesses. It is not that the evidence ought to be discredited by reason of the witness being simply an interested witness but in that event the court will be rather strict in its scrutiny as to the acceptability of such an evidence.

[22] I find that SP8's testimony as to the reason for being within Taman Rakan area and the reason for calling the victim to meet him at the restaurant as inherently improbable. SP8 had testified that he had gone to Taman Rakan with SP9 to have a meal at a restaurant and he was accosted by a group of unidentified Malay youths while on his way to the said restaurant. SP8 testified that after being allegedly punched, he and SP9 had proceeded to the restaurant where they had a meal. SP8 testified that about 15 minutes had passed after the alleged attack on him and that the group of unidentified Malay youths did not follow him into the restaurant. In fact, after the victim arrived at the restaurant, the victim had joined SP8 and SP9 and had a meal together. SP8 had then made a phone call to the victim allegedly to ask the latter to send him back home since the former's house was far from Taman Rakan. This is an improbable explanation. In *Muniandy & Ors v. PP* [1966] 1 LNS 110; [1966] 1 MLJ 257, the Federal Court held at p. 258 that - "The inherent probability or improbability of a fact in issue must be the prime consideration". If SP8 had arrived at the restaurant in Taman Rakan on foot, he would not face a problem in walking back to his home no matter the distance. Therefore, the reason for SP8 in calling the victim to meet with him in Taman Rakan was for them to look for the unidentified group of Malay youths in order to have a fight.

[23] I am making a similar finding and assessment of SP9's testimony. SP9 who had gone with the victim to look for the group of Malay youths was also involved in the fight. SP9 testified and confirmed in cross examination that the situation was extremely chaotic and he could not identify who had attacked him and the victim or even whether any of the persons had used a weapon during the fight. SP9 had also left the victim and escaped

to hide in the restaurant with SP8 until the arrival of the police. As such, neither SP8 nor SP9 were witnesses as to the actual person or persons who had attacked the victim.

[24] Another witness to the fight was SP10 who was also acquainted with the victim. SP10 also did not see the actual person or persons who had attacked the victim. SP10 had identified the 1st and 2nd child as being part of the group of Malay youths that had attacked the victim during his identification parade. I find that SP10 is able to identify the 1st and 2nd children in his identification parade because SP10 was working in an advertising shop in Taman Rakan where the 1st and 2nd children were staying. The court is mindful to reject the testimony of SP10 because he was standing at a far distance from the scene where the victim was being attacked, to be exact about six shops away from the motorcycle repair shop. In cross examination, SP10 admitted that he had forgotten many of the events on the fateful day and the last he had seen the victim, the latter was running towards the surau. SP10 had gone into a coffee shop thereafter and did not see what had happened further to the victim. These facts taken with the fact that SP10, as the victim's friend is treated as an interested witness renders this court's inability to accept SPlO's testimony as credible.

[25] It is pertinent to note that before proceeding further that none of the four children were arrested on 29 September 2006 ie, the day the victim was killed. The four children had also cooperated with the police at the time of their individual arrest. SP14 had testified and confirmed that the 1st and 4th children were present at the scene of the incident because they were assisting in selling drinks at the Ramadhan bazaar. SP14 was acquainted with both the 1st and 4th child. SP14 had confirmed that he had seen the 1st child sporting a bandage on his forehead on the day. It is pertinent to note that initially, SP14 was also a suspect in the murder of the victim but he was eventually released by the police and turned as prosecution's witness. SP14 is similarly an interested witness and the principle laid down in *State of Haryana v. Ram Singhhand* applies.

[26] The final prosecution's eye-witness is SP15. I am unable to accept SP15's testimony in positively placing the four children as being part of the Malay youths that had attacked the victim. SP15's identification of the four children is attributed to the

admitted fact that the four children had regularly been customers in his motorcycle repair shop. I am treating SP15's testimony with caution because he had testified that the victim was chased by a group of ten youths but SP15 could only identify the four children who were his regular customers. In cross examination, SP15 admitted that he did not assist the victim and after the victim was dragged out of his shop, he had gone back to work. SP15 admitted that the group of Malay youths had consisted of other unidentified persons.

[27] I find that the victim's cause of death as established through the forensic pathologist, SP3 and the post mortem report (exh. P7) was blunt injuries to the head that could only be caused by a blunt object. The only prosecution's eye-witness who had testified seeing the victim being attacked by a youth holding a piece of wood is SP10. SP10's testimony could not carry weight in positively placing any of the four children as the person who had attacked the victim with a piece of wood. The reason is that SP10 could not identify the actual person who had held said piece of wood and hit the victim.

[28] Apart from these witnesses, the prosecution has failed to bring forth any independent eye-witnesses to the fight *viz* a member of the public that was present at the scene of the crime. I find in agreement with the defence counsel's argument that the investigating officer, SP22 had failed to conduct any investigation or record the statement from the public. SP22 had only recorded statements from the interested witnesses who were friends of the victim and SP14 who was initially a suspect. It is vital to the prosecution's case to have the testimony of independent eye-witnesses in order to corroborate the oral evidence of the interested witnesses.

[29] The prosecution has failed to *prima facie* establish against the four children the first element under s. 300 of the Penal Code *viz* the *actus reus* to cause injury on the victim that culminated in the latter's death. Therefore, the prosecution has also failed to *prima facie* establish the second element of *mens rea* to cause murder against the four children. I find that the charge under s. 302 of the Penal Code against the four children has not been established *prima facie* by the prosecution.

Has The Prosecution Prima Facie Established The Charge Under s. 149 Of The Penal Code Against The four Children?

[30] In my judgment, the answer to this question is similarly in the negative. Based on the above reasons, the prosecution has failed to *prima facie* establish that the four children were the persons who had caused the death of the victim and that the four children were ever part of the group of Malay youths that had attacked the victim on 29 September 2006. Section 149 of the Penal Code is invoked subject to the proof that there was common intention to cause hurt to the victim.

[31] In *Robin anak Mawang v. PP* [2005] SGHC 222, His Lordship Yong Pung How CJ held at p. 387 that - "Once the common object of the unlawful assembly of causing hurt was established, it was sufficient for the prosecution to show that one or more of the members had punched and kicked at Alim, and this member need not necessarily be the appellant. In the present instance, the evidence clearly established that the appellant was part of a group of five persons behaving rowdily, who had a common object to hurt Alim as they all participated in one way or another in the assault, either by punching or kicking Alim. A further point to note was that none of them tried to stop the assault. It was obvious that violence was used and Alim suffered various injuries to his head."

[32] In the present case before this court, the four children were not part of the unlawful assembly *viz* the group of unidentified Malay youths based on the analyses stated in the above passages. There is no common intention to cause the death of the victim that is attributed to the four children. I find that the prosecution has failed to *prima facie* establish the element of unlawful assembly under s. 149 of the Penal Code against the four children.

Conclusion

[33] Based on the above reasons, I hereby acquit and discharge the four children from the charge of murder under s. 302 of the Penal Code and the charge of unlawful assembly under s. 149 of the Penal Code.